

## SOVEREIGNTY--MODERN APPROACH TO A REGRESSIVE CONCEPT

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### ABSTRACT

*Sovereignty as a supreme authority within the state system moves in the context of International Law with reference to the contribution of Grotius of the early 17<sup>th</sup> century. Grotius has taken the concept of Sovereignty to a level where the consideration of the problem of maintaining the sovereignty in a multi sovereign environment which requires law to regulate the sovereign systems and to have International legal framework to co-ordinate sovereign relations (International Relations) and to provide International Restraints on the sovereign state systems. A reference to the Treaty of Westphalia (1648) in the juridical development of sovereignty-- a juridical framework that has reflected in the most theories of International law which is founded on the Nation State system. This Article refers to the work of International scholars and Philosophers. Early International Lawyers have agreed the changing concept of sovereignty where the subordination of sovereignty to the international obligation. These developments have been confronted by the theory developed by English legal philosopher John Austin and his view of sovereignty as blatant indication to the use of positivistic approach. His approach was to deny the legal character of International Law.*

*Conclusion: Sovereignty is a contested concept of legitimacy and authority. The revolutions of the 18<sup>th</sup> century are an example of this concept. The nation-State and sovereignty are two entities that are closely connected which is very difficult to tell them apart. It has proved to be troublesome in the area of National and International level.*

**KEYWORDS:** Sovereignty, International Law, Nation State

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### INTRODUCTION

#### INTRODUCTION TO THE BACKGROUND HISTORY OF SOVEREIGNTY

Sovereignty is ultimate authority. It necessitates authority over all the others with in its influence of jurisdiction and absence of any other authority parallel to it. Sovereignty is essentially a legal assemblage rather than incredible possession of power and authority in reality; it is also sometimes understood as political sovereignty. It is imperative to admit that sovereignty is a universal part of our existing political vocabulary. It is fundamentally a historical conception. Sovereignty was unknown before the 16<sup>th</sup> century<sup>1</sup>. Ancient Greeks, Romans, scholars and political thinkers were in dark, the concept was not familiar to the world<sup>2</sup>. Roman law provided scientific expressions to the theory of sovereignty; they spoke only about diverse hierarchy of authority and not about 'supreme power'—all in

Sovereignty in general is either 'internal' or 'external'. It is entirely proper to say that the concept of sovereignty cannot be easily identified into two separate categories. To appreciate what sovereignty is, one cannot bring to a halt by discovering who has the powers of a sovereign. Sovereignty is in its completeness is a very modern phenomenon, whose

<sup>1</sup> J. A. Camilleri, and J. Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World*(Aldershot, 1992), p. 239. Also D. Held, 'Introduction: Central Perspectives on the Modern State,' in *States & Societies*, ed. D. Held et al (Oxford, 1985), pp. 1-2.  
<sup>2</sup> A. Vincent, *Theories of the State* (Oxford, 1987), p. 32.

surfacing can be traced to no further than into the early modern period<sup>3</sup>, but nonetheless remains with us almost undamaged with us even today being essentially thought of as ‘absolute and indivisible’.

Since sovereignty is a political concept, the question arises ‘who should be the sovereign’? It attempts to provide certain justifications for a political authority which was unquestionable previously. The concern here is the moment of questioning itself—the rational blankness instead of previously unquestioned traditions which confine forms the integral part of political concept.

Jean Bodin (1520-1596) did not discover sovereignty, certainly was the first who gave a thought and conceptualized in a methodical manner<sup>4</sup>. His principal concern was to find a way out to end the chaos and war, which he supposedly perceived to be the likely result of the feudal order with its numerous roots formally united with the Church and Emperor, where they having no control to suppress the others at the moment of crisis.<sup>5</sup> In essence the clout of sovereignty is for him the capacity to create laws and crack them according to one’s will.<sup>6</sup>

Hobbes (1588-1679) likewise to Bodin wrote his piece *Leviathan* during the era of civil war. His concept of sovereignty was all encompassing. He acknowledged the right of the individual only with view to self preservation.<sup>7</sup> The contradiction of Hobbes is that, he bases his legitimacy with the relation between him and the subjects, and the ruler is made self directed, perhaps even operating against the community as a whole on from where he derives his legitimacy. Bodin could not have this predicament for the reason that his source of legitimacy was God. To Bodin ‘sovereignty’ is “absolute and indivisible” and consequently cannot permit the sovereign any limitations on his powers yet if it means the fight in opposition to his own people. The gap between the State Sovereignty and the Popular Sovereignty is thus open. The gap in legitimacy between the ruler and the ruled did not fade away, while there were certainly several attempts to solve this two-facedness in many different ways. Sovereignty as a supreme authority, ‘absolute, indivisible, supreme power’ is based upon the Hobbes’s idea that the state can operate much against the wishes of those subjects from whom it draws its legitimacy.

### **Notion of Sovereignty in International Law**

The peace of Westphalia brought the war since thirty years to an end. The notion of sovereignty in International Law is just about identical with the history of International Law itself.<sup>8</sup> Prior to this thirty years war, which was partly a religious war, the European world of Christendom was largely a joint heads of state, one of pope and emperor. As a consequence of its defeat,<sup>9</sup> the Roman Empire was dissolved into hundreds of independent powers that be more or less

<sup>3</sup> R. Cooper, *The Postmodern state and the New World Order* (London, 2000), p. 45: defines the early modern period as dominated by centralised states, gradual shift from agrarian to commercial economy, rationalism and foreign relations dominated by the inter-state interaction.

<sup>4</sup> J. Hoffman, *Sovereignty* (Buckingham, 1998), p. 35.

<sup>5</sup> J. Bodin, *Six Books of the Commonwealth* (Oxford, 1955). Also D. Held, ‘Introduction: Central Perspectives on the Modern State,’ in *States & Societies*, ed. D. Held et al (Oxford, 1985), p. 2.

<sup>6</sup> J. Bodin, *Six Books of the Commonwealth* (Oxford, 1955), II.

<sup>7</sup> T. Hobbes, *Leviathan* (London, 1914). For the ‘right of self-preservation’ which Hobbes grudgingly in *De Cive* acknowledged as ‘inalienable right’ see D. Baumgold, ‘Hobbes’, in *Political Thinkers From Socrates to the Present*, ed. D. Boucher and P. Kelly (Oxford, 2003), pp. 174-176.

<sup>8</sup> Steinberger, Helmut, “Sovereignty”, in Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, Vol. IV (Amsterdam, etc.: Elsevier, 2000), at 501.

<sup>9</sup> The Peace of Westphalia also meant the defeat of the Catholic authority as it provided for a juxtaposition of Catholics and Lutheran-Calvinist protestants. When Pope Innocent X, by the bull *Zelo domus Dei*, declared the tolerance and other clauses, the core of the Peace,

equal sovereignty on their population and territories which supposedly marked the birth of Nation-State System. The State Sovereignty grew stronger ever since. Through the 17<sup>th</sup> and 18<sup>th</sup> century's novel principle of exclusive territorial jurisdiction was developed eliminating the medieval assortment of overlapping jurisdictions. Thus the state sovereignty meant a state's independence from the legal changing concept of permanency to impermeability in relation to foreign powers on one hand and the state's exclusive jurisdiction on the other. The legitimacy of the sovereign state was no longer considered as religious but secular, its reason behind the rationale being self-assertion and continued existence.<sup>10</sup> As a consequence of such a notion of sovereignty, the theory of non-intervention in domestic affairs developed parallel to preserve and protect state sovereignty. History reveals that the notion of absolute sovereignty was 'off and on' during the 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> centuries.

### **Sovereignty and International Arrangement after the First World War**

Numerous treaty laws came up between European colonizers and non-European potentates.<sup>11</sup> These potentates were deemed to be a sovereign for the purposes of transferring the powers to their colonial conquerors.<sup>12</sup> These in terms of control and authority, vast sectors of our earth have experienced the loss of sovereignty and one of the restrictions to the exercise of its capability without having consented to those limitations. The reason for the failure of this is the anarchical system which resulted in great tragedy of the First World War.<sup>13</sup> The American president, Woodrow Wilson, promoted the proposal of sovereign cooperation via League of Nations—a proposal which was together was supported. Well, the League of Nations would require a little subordination of sovereignty to International Law. Whatsoever, the idea of sovereignty was still dominating and the League emerged with a unanimity rule<sup>14</sup>. If a single sovereign state objected to the League's power on a matter within its competency, the League would not be able to act. The paralysis of the League is one of the reasons that is said to have contributed to the Second World War.

### **Sovereignty and International Arrangement after the Second World War**

The Second World War was carried on in the principle that a sovereign may determine whether and in what limits it would honour in carrying out the war. Germany under Hitler urbanized the idea that it was drawn in "total war"<sup>15</sup>. Under the guise of sovereignty, there was restricted claim that there were no regulations from the law of war that could limit the privilege of the sovereignty. Furthermore, the Nazis were race-obsessed and persons of Jewish community as candidates for physical extermination. They viewed the Slavic people as sub-human and were subjected to extreme brutality used by

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"null, void, invalid, inequitable, unjust, condemned, reprobated, frivolous, of no force or effect" (Dumont, *Corps universel diplomatique, etc.*, II(1), 463), the treaty was carried out in all its parts. Nussbaum, Arthur, *A Concise History of the Law of Nations*, rev. ed. (New York: The Macmillan Company, 1954), at 116.

<sup>10</sup> Steinberger, *loc. cit.*, note 1, at 507.

<sup>11</sup> *see generally* Daniel H. Nexon, *The Struggle For Power In Early MODERN EUROPE: RELIGIOUS CONFLICT, DYNASTIC EMPIRES, AND INTERNATIONAL CHANGE* (Princeton Univ. Press 2009); *see also* Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20-41 (1948).

<sup>12</sup> Nele Matz, *Civilization and the Mandate System under the League of Nations as Origin of Trusteeship*, 9 Max Planck Y.B. U.N. L. 47, 47-95 (2005); *see also* Anghie, Antony, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y. UNIV. J. INT'L L. & POL. 513 (2002).

<sup>13</sup> James Joll, *The Origins Of The First World War* (Longman 1987).

<sup>14</sup> Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300 (1968) (explaining a refined and systematic study of the theory of international law obligations as a limiting source of authority on the conduct of sovereign states in the international environment).

<sup>15</sup> Alan John Percivale Taylor, *The Origins Of The Second World War* (Simon & Schuster 1996); *See Generally* Winston Churchill, *The Second World War* (Golden Press 1960).

Nazis and claimed that it was in their own interest.<sup>16</sup> At the end of World War-II, substantial unrest was generated about the notion of the exploitation of State sovereignty and the degree of the horror it could generate. The most imperative effort that clearly establishes limitations to what government could do is reflected in the Nuremburg Tribunal.<sup>17</sup> In the Nuremberg trial the defence that the defendants were merely executing the orders of the sovereign was discarded.<sup>18</sup> “The court stressed that behind the blanket of sovereign are the finite human agents of decision making.” The court could therefore pierce the blanket of the state and sovereign to hold the decision makers responsible. In notable terms, Nuremburg established a decisive denial of the principle of sovereign absolutism. The effect of it was, it repudiated the legal theories of sovereignty that sought after to secure defendants from responsibility for mass murder.

### U.N. Charter and Sovereignty

The U.N. Charter is a means by which the members assert their sovereignty and as well as limit the same. The Charter is like a formal document for the community of nations.<sup>19</sup> It was the outcome of the total war. It was a consequence of the World War-II. As a protective measure the Charter placed limitations to the sovereignty of its members<sup>20</sup>. Strangely enough membership in the United Nations was an essential means to affirm the sovereignty. The Charter was drafted for the sovereign nations of the world. The Charter also inherited extensive body of International Law that preceded its notch into force. Although the higher law aspirations of International theorists like Grotious, Pufendorf, Vattel, had unrelenting footing. The authority of this perspective is well contained by the Permanent Court of International Justice in the Lotus Case, from where the important principle of International Law took birth. The Permanent Court of International Justice stated that “restrictions on the sovereignty of states cannot be presumed”<sup>21</sup>. This made all the difference to the probability that there are no presumptive limits to the sovereignty in the International Legal system.<sup>22</sup> The failure of the League of Nations was embedded in the principle that any sovereign state had a right to exercise veto in the League. The effect of which resulted in the U.N. Charter having responded to these and other issues in defining the ambit of sovereignty and the vigor of International commitment. In this case the Court expressed that a sovereign has to consent in order to be bound by an international commitment along with no presumed limitations to the sovereignty of a state thus recognizing the principle of International Commitment. This gave a primacy to sovereignty of the nation state.

<sup>16</sup> See generally Leonid Rein, *Untermenschen in SS Uniforms: 30th Waffen-Grenadier Division of Waffen SS*, 20 J. SLAVIC MIL.STUD. 2 (2007); see generally ROBERTS. WISTRICH, *HITLER AND THE HOLOCAUST* (Random House Digital, Inc. 2001).

<sup>17</sup> Winston P. Nagan, *Racism, Genocide, and Mass Murder: Toward a Legal Theory About Group Deprivation*, 17 NAT'L BLACK L.J. 133 (2004) (rethinking the boundaries of human rights, humanitarian law and the scope of intervention. Draws attention on the problem that states have indulged in unlimited atrocity justified as an exercise of sovereign absolutism seeking to generalize the major forms of human rights, humanitarian deprivation and the problems generated by a thick version of sovereignty developing a general social process of contextual foundations).

<sup>18</sup> *Opinion and Judgment of the Nuremberg International Military Tribunal or the Trial of German Major War Criminals for War Crimes and Crimes Against Humanity*, Nuremberg, 30th September and 1st October, 1946

<sup>19</sup> See United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at <http://www.unhcr.org/refworld/docid/3ae6b3930.html>; Fassbender, Bardo *The United Nations Charter As Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); see also Leland M. GOODRICH, ET AL., *CHARTER OF THE UNITED NATIONS* 290-309 (3d ed. 1969) (for a discussion of the history of the Charter of the United Nations and justifications as to why the Security Council is imbued with such power.).

<sup>20</sup> Ira Leitel, *The United Nations Charter as a Restraint Upon a Nation's Right to Wage War*, 36 BROOK. L. REV. 212 (1969-1970); see also LELAND M. GOODRICH, *FROM LEAGUE OF NATIONS TO UNITED NATIONS. INTERNATIONAL ORGANIZATION* 1, 3-21 (1947).

<sup>21</sup> S. S. *Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 20-46, for judicial authority for the idea of thick sovereignty. Its central proposition was that there were no presumptive limits to sovereign authority in international law.

<sup>22</sup> Stephan Hobe, *The Era of Globalisation as a Challenge to International Law*, 40 DuQ. L. REV. 655 (2001-2002).

Another significant example of practice during this era emerged from the significant arbitral decision of the *Island of Palmas Case*. In this case observance of the International Law strengthened the meaning of sovereignty.<sup>23</sup> In this case the arbitrator considered that mere sighting as a basis for title to the sovereign power and control of the territory was weak and could not beat the declaration of sovereignty of the state that exercised uninterrupted control and authority on the land. Lying this logic, the arbitrator honored sovereignty as exercised by effectual power versus sovereignty as a ostensible legalistic declaration of title by discovery<sup>24</sup>.

### International Sovereignty a Contemporary Approach

Universal model attributed to the term sovereign state is a speaking hint of the incorrectness of the description assigned to entities regarded as states. The idea of independent sovereign state actors is a wide spread fantasy and feeds the fallacy that sovereignty is being eroded. Fundamentally there is shift in its standing as an international norm. The norms of the International State model were violated most of the time and therefore emerged as a mere 'cognitive script'. The modern Sovereignty has been characterized as a fundamental rule of co-existence with in the modern nation state system. In contemporary usage Krasner suggests four widespread types of sovereignty which are:

Interdependence sovereignty

Domestic sovereignty

Westphalian Sovereignty and

International Legal Sovereignty

These four broad types of sovereignty are inter-related, whether concerning to the states power internally or externally, each extent of the degree is articulated in a spatially explicit manner. The Montevideo Convention on Rights and Duties of states of 1933, Article 1 provides:

"States as a person of International Law should possess the following qualifications:

- A permanent population
- A defined territory
- Government, and
- Capacity to enter into relations with other States.<sup>25</sup>

The post war period was radically influenced by the development of scientific technologies that permitted the misuse of resources not habitually included within the limitations of the sovereign state. Among these were the resources of seas and the Polar Regions. The Geneva Conventions on the law of the sea of 1958, which stretched out and controlled sovereignty by accord, it was a foremost instrument to the territorial proportions of sovereign competence<sup>26</sup>. It gave clarity

<sup>23</sup> *Island of Palmas (Neth. v. U.S.)*, HAGUE CT. REP. (Scott) 83 (Perm. Ct. Arb. 1928) (establishing three important rules concerning island territorial disputes and becoming one of the most highly influential precedents dealing with island territorial conflicts). 460

<sup>24</sup> Michael Fowler & Julie Marie Bunck, *Law, Power, And The Sovereign State: The Evolution And Application Of The Concept Of Sovereignty* (Penn State Press 1995).

<sup>25</sup> (1934) 165 *League Of Nations Treaty Series*, At 19.

<sup>26</sup> Geneva Conventions on the Law of the Sea, Apr. 29, 1958, A/CONF. 13/L.58, vol. 2 146; (UNCLOS I; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11;

in the principle of the freedom of the seas as an exercise of sovereignty over the deep sea ocean explorations. Sovereign rights were also limited with regard to consideration of conserving living resources of the high seas. There was another important resource in the region of Antarctic. This was governed by The Antarctic Treaty System of 1959 which recognizes that the presence on the Antarctic of Nation States scientific teams. These teams occupying parts of this continent would exercise a restricted form of occupancy possessory rights dependable with the flag approved by the investigating research team.<sup>27</sup> The appreciation of these rights required analogous obligations. These teams were restricted to peaceful activities, emphasizing the freedom of scientific investigation and the sharing of results. The later developments were concerned to matters regulating mining activity and environmental protection. There was another vital treaty which created inclusive sovereignty on spaces and resources is the Convention on the Law of Sea-1982. This treaty extended the sovereignty of the territorial sea limits of a state, the contiguous zone, and 200 nautical miles exclusive economic zone for the state was established. It also clarifies the sovereign authority of the state over the continental shelf.

A practical problem arose where the traditional law of sea where the state could put to use its scientific technology for exploitation of common resources for its own benefit. This convention on laws of sea attempted to solve the problem by creating a Deep Seabed Authority. This seabed authority could certify mining activities and in return for fees which was supposed to be dispersed through the U.N. System.

## CONCLUSIONS

The Nature of sovereignty is definitely changing. Sovereignty is the most challenging concept that was principally shaped by the historical development of the last five centuries and also by the development of nation state. Sovereignty is challenged in the logical sense that the classical understandings believe autonomy of legitimacy and authority while the authenticity, facing the state through history, has been noticeable by disagreement over control of authority and legitimacy.

The revolutions of the 18<sup>th</sup> century are an example of that disagreement which resulted in transmission of legitimacy from the ruling elite to the public. This resulted from the shift of sovereignty as responsibility as contrasting to sovereignty of control. The rise of humanitarian intervention during 1990's is an example of this. The violations of human rights which were responsible for by the governments were no longer seemed as internal matter which the international community could do almost nothing about it owing to the norms of sovereignty. The conception that the state's sovereignty was revered lost all its credibility. Interventions do take place but are viewed as humanitarian since 1990's when huge human rights abuse took place to be a matter of international distress and necessary coercive military intervention was a needed solution. This paved the way for basic responsibility of the states towards their own subjects, a principle at the very heart of the perception of sovereignty as responsibility. In September 2014, the General Assembly held a deliberation on the sixth Secretary General report<sup>28</sup> which stated and identified that the various international actors, their approaches and principles to help guide and to assist the States through encouragement, capacity building and protection.

The present generation has a new definition of sovereignty as a responsibility as opposed to control and this was ratified by the Security Council of U.N. in 2006 and by the General Assembly in 2009. This goes to clearly show the

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Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285; Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311)

<sup>27</sup> Antarctic Treaty, Dec. 1, 1959. This Treaty recognizes that the presence on the Antarctic of nation States' scientific teams occupying parts of this continent would exercise a limited form of occupancy/possessory rights consistent with the flag carried by the research team. It stresses the freedom of scientific inquiry and the distribution of results.

See also Steven J. Burton, *New Stresses on the Antarctic Treaty: Toward International Legal Institutions Governing Antarctic Resources*, 65 VA. L. REV. 421 (1979).

<sup>28</sup> "Fulfilling our collective responsibility: International assistance and the responsibility to protect" ([A/68/947-S/2014/449](#))

transformation of sovereignty by the opinion of IGO, such as United Nations Organization where sovereign states contribute and can also have their say.

To conclude I can say that there is legitimate compromise in the International Community of States to adjust the common understanding of sovereignty to better shape the reality of interdependence and universal co-operation.

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